

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 120 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.DAVE and
MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

MARWADI NAGARAM BADHAJI

Versus

STATE OF GUJARAT

Appearance:

MR EE SAIYED for Petitioner

MR. S.T.MEHTA, LD.PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE S.D.DAVE and

MR.JUSTICE H.R.SHELAT

Date of decision: 25/06/96

ORAL JUDGEMENT

PER: DAVE, J:-

The Appellant came to be tried and convicted for the alleged commission of the offence punishable under Section 20-B(2) of the Narcotic Drugs And Psychotropic

Substances Act 1985 (hereinafter referred to as the "Act") and came to be sentenced to the R.I. for ten years and to a fine of Rs.1,00,000-00, in default to a further S.I. for one year; by the learned Addl. Sessions Judge, Junagadh in C.C. No. 138 of 1991 vide the orders dated December 21, 1991. The said orders of conviction and sentence have been brought in challenge in the present appeal by the appellant before us.

Learned counsel Mr. E.E. Saiyed appearing on behalf of the appellant places in forefront a solitary contention regarding the non-compliance with the mandatory provisions contained under Section 50 of the Act of 1985, and urges that the whole prosecution has been vitiated on this count and therefore, the present appeal requires to be allowed. As we propose to decide this appeal on this contention alone, we do not find it expedient to dwell upon the fabrics of the case. For the purpose with which we are concerned it would be sufficient to note that, according to the case of the prosecution Yasimkhan Shaikh, PW-4, Exhibit-10, the complainant i.e. the PSI attached to Keshod police station was on the night round during the night between 25 and 26th March 1991 in company of certain other police personnel. They had reached the station area at Keshod town at about 2.30 p.m. and at that time they had found the appellant accused proceeding with a small bag in his hand. He was intercepted and the search was carried out, which had shown that he was carrying 380 grams of opium in a small read coloured polyethylene cover which was placed in a larger bag. When the appellant accused could not account for the legal custody of the above said quantity of opium, the panchas were called, panchanama was drawn up and the FIR came to be registered. The muddamal forwarded to the Chemical Analyzer had shown that the quantity recovered from the appellant accused was opium and therefore a substance or a drug falling within the Act of 1985. After the investigation was complete appellant accused was tried in respect of the charge at exhibit-1. The appellant accused had pleaded not guilty to the charge levelled against him and had claimed to be tried by the Court. On the appreciation of the evidence on record, learned Addl. Sessions Judge, Junagadh has convicted the appellant accused and has sentenced him as indicated by us above. The said judgment of conviction and sentence is in challenge before us.

As indicated above, the reliance is being placed by learned counsel for the appellant upon the provisions contained under Section 50 of the Act of 1985. A

reference to this provisions would go to show that, at the time of the search, the officer carrying out the search is required to take the person searched if he so opts without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. The verbalism used in this provisions would go to show that the officer conducting the search has to ask the accused as to whether he would choose the performance of the above said formality.

The true intent and scope of the provisions contained in Section 50 of the Act of 1985 have been explained by the Supreme Court in Saiyed Mohd. Saiyad Umar Saiyad & Ors. Vs. State of Gujarat, 36(2) GLR, page-1315 This decision rendered by the Apex Court while considering the provisions contained under Section 50 and 54 of the Act of 1985 lays down that, it is obligatory on the part of a Police Officer to inform the citizen that he has a right to have him searched in the presence of a Gazetted Officer or a Magistrate and a failure to so inform the citizen would be fatal to the case of the prosecution. It is also made clear that, no presumption can be drawn that the Police Officer had discharged his duty. While considering the provisions contained under Section 54 of the Act of 1985 it is made clear that the onus cast on the accused under the said provisions would not be able to cure the lacuna and in such case the accused would be entitled to be acquitted. Thus it is clear upon a conjoint reading of the provisions contained under Section 50 of the Act of 1985 and the say of the Supreme Court in case of Saiyad Mohd. Saiyad Umar Saiyad (supra) that, it is obligatory on the part of the Police Officer to perform the formalities as mandated under the said provisions.

After having a look at the settled legal position we have examined the evidence tendered by the prosecution with a view to ascertain, as to whether, as a matter of fact, such a formality was performed by the Investigating Agency. The answer requires to be in negative, regard being had to the clear evidence on record. Exhibit-11 the FIR lodged by Mr. Shaikh, PSI attached to Keshod police station does not say anything in this respect. Panch no.1 Pravinchandra P.W. No.1, Exhibit-6 also does not say anything in this respect. Panchanama at Exhibit-7 is utterly silent. Melabhai, P.W. No.2, Exhibit-8 the Head Constable, and Khimabhai, P.W-3, Exhibit-9 the Police Station Incharge also did not say anything in this respect. This evidence on the contrary would go to show that, as soon as the appellant accused allegedly was seen the search had commenced and the

salutary provisions contained under Section 50 of the Act of 1985 were not taken care of.

Learned Government Counsel Mr. S.T.Mehta was not in a position to show us anything upon the basis of which a contrary view could be taken by us. After having a careful look at the prosecution evidence, Mr. Mehta was not in a position to draw our attention to any material showing that the said provisions were complied with.

Thus, it appears that, as the said provisions contained under Section 50 of the Act of 1985 were not complied with, the whole case of the prosecution would fall flat because of the technical hitch. On this count alone the present appeal succeeds and the same requires to be allowed. We hereby accordingly allow the appeal and set aside the judgment of conviction and sentence rendered by the Court below. The appellant-accused is acquitted of the offence punishable under Section 20-B (2) of the Act of 1985. The appellant-accused is behind the bars and therefore he be set at liberty forthwith, if not required in any other criminal case or proceedings.

Before parting, it shall have to be noticed that the charge was for the alleged commission of the offence punishable under Section 66(b) of the Bombay Prohibition Act 1949. No conviction has been recorded on this count. We do not therefore say anything in that respect. Even if the conviction were to be recorded on that count in near future, the imprisonment undergone by the appellant accused could be said to be sufficient. D.S. permitted.
